Petition

Supreme Court, U.S.
FILED
MAR 15 1982
ALEXANDER L. STEVAS
CLERK

81-1772

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO._____

LINDSAY MARTELL,
JOSEPH MINNECI,

PETITIONERS,

V.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I

Whether the warrantless seizure of luggage from individuals boarding a flight at a commercial airport, and subsequent removal of the luggage and individuals to a police office located elsewhere in the airport, requires probable cause?

II

Whether the warrantless seizure of "inanimate objects" by federal agents may be based merely on "reasonable suspicion" rather than probable cause.

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NO. _____

IN THE SUPREME COURT OF
THE UNITED STATES

October Term, 1980

LINDSAY MARTELL
JOSEPH MINNECI,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF
CERTIORARI TO THE UNITED
STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

The Petitioners, Lindsay Martell and Joseph Minneci, respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on August 31, 1981.

OPINIONS BELOW

The United States Court of Appeals for the Ninth Circuit entered its opinion affirming the conviction of Petitioners on August 31, 1981. The opinion, a divided decision, is reported at 654 F.2d 1356 (9th Cir. 1981). A copy of the Opinion is attached as Appendix "A". On November 6, 1981, the Court of Appeals amended its opinion. The Amendment is attached as Appendix "B". (The Amendment is included in the reported Opinion). On January 13, 1982, an Order was entered denying a Petition for Rehearing and rejecting a Suggestion for Rehearing en banc. A copy of the Order is attached as Appendix "C".

JURISDICTIONAL GROUNDS

On August 31, 1981, the Court of Appeals for the Ninth Circuit entered an Opinion affirming the conviction

of Petitioners. A Petition for Rehearing and Suggestion for Rehearing en banc was denied and rejected on January 13, 1982.

The jurisdiction of this Court is invoked pursuant to Title 28, U.S.C. Sec. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Fourth Amendment:

> The right of the People to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation . . .

STATEMENT OF THE CASE

I

On September 30, 1979, DEA agent Charles Kenerson, based in San Diego, California, received a telephone call from a DEA agent in Anchorage, Alaska. Kenerson understood the other agent to say that two subjects, one of whom had been arrested (Martell) eight months earlier with cocaine and a large sum of cash, had made arrangements to fly from Anchorage to San Diego.[1] Martell was traveling under the name of A. Brewer.

Kenerson and other agents began surveilance of the San Diego Airport on December 30, 1979. Petitioner

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1/ This information was erroneous in that Petitioner Martell had not been previously arrested.

Minneci arrived that night carrying two suitcases. He was observed making two phone calls, and then taking a cab to the Sheraton Harbor Island Hotel. Petitioner Martell arrived at 7:10 the next morning, made a phone call to the Sheraton and proceeded there, checking in under the name of Martell.

At approximately 9:45 a.m. Martell was observed leaving the hotel with an unidentified male in a white Toyota pickup truck which was then driven in a somewhat erratic manner. The truck returned to the hotel within five minutes, whereupon Martell reentered the hotel and proceeded to the third floor. Ten minutes later Minneci was observed making telephone calls, after which he went to Martell's room on the third floor.

At 11:30 a.m. Minneci and Martell left the hotel and went back to the airport. They purchased tickets under the names of Minneci and Taylor on a 12:20 p.m. Western Airlines flight to Anchorage. After purchasing their tickets, they left their carry-on suitcases in the security area and went back outside the security area to the bar to have a drink. At 11:40 a.m., DEA agents sent for a narcotics detector dog. At approximately 12:10 p.m., Martell and Minneci were halted by seven or eight DEA agents as they approached the boarding area to board their flight. The agents identified themselves and stated they were conducting a narcotics investigation. Both Petitioners were frisked by the agents. The agents testified that they had intended to detain the Petitioners when they approached them and they were

not free to board their flight. In Martell's case an agent testified that this was made clear to Martell by inter alia the fact that his flight left in only five minutes. In Minneci's case there was testimony that his airline ticket was seized. The agents asked for permission to search the carry-on suitcases, which Martell and Minneci refused.

At approximately 12:30 p.m. (20 minutes later) Petitioners were taken downstairs in the airport to the Harbor Police Office. Their carry-on luggage, which had been previously seized by the agents, was also taken down to the police office. As Petitioners were removed to the police office, they remain surrounded by several DEA agents.

Upon arrival of Petitioners and their luggage at the Harbor Police

Office, a narcotics detector dog (Duster) was allowed to "sniff" the luggage. After Duster gave a positive alert for narcotics in the suitcases, Martell and Minneci were transported to the Narcotics Task Force Office in the east end of the airport. It was at the time of the alert by the narcotics detector dog that the trial Court held probable cause first arose. The subjects were detained in the Narcotics Task Force Office for approximately four hours until a search warrant was obtained. The suitcases were searched and cocaine was discovered inside one of the suitcases. Petitioners were then placed under arrest. (Appendix A pp.33-38).

II

On October 10, 1979, a Two Count Indictment was filed against the Petitioners in the United States

District Court for the Southern District of California charging them with conspiracy to posses cocaine with intent to distribute and possession of cocaine with intent to distribute in violation of Title 21 U.S.C. §§841(b)(1) and 846. Petitioners filed pre-trial motions to suppress all the evidence discovered in the luggage as a result of their illegal arrest and concomitant illegal seizure of their luggage. Following an evidentiary hearing, the trial Court denied Petitioners' suppression motions. The trial Court ruled that the Petitioners were legally detained by the DEA agents at the airport based on a "reasonable or founded suspicion," citing United States v. Brignoni-Ponce, 422 U.S. 873 (1975), with probable cause to arrest and search developing after the positive alert by the narcotics detector dog. The trial

Court did not address the issue of the seizure of Petitioners' luggage at the time they were "detained" by the officers. (E.C.R. 1-3; 65).[2]

III

The divided Court of Appeals affirmed the convictions of the Petitioners. The majority of the Court, per United States District Court Jesse W. Curtis, sitting by designation, held that even though the Petitioners may have been unlawfully arrested in the airport, the seizure of their suitcases, although simultaneous to their arrest, should be considered separate and apart from the seizure and arrest of the Petitioners. The majority reasoned that the seizure of inanimate and impersonal objects,

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2/ "E.C.R." refers to the excerpt of Clerk's Record filed in the Ninth Circuit Court of Appeals.

such as luggage, need not be accompanied by probable cause or a warrant and that the seizure of "things" is a substantially less serious intrusion than the seizure of persons, thereby making normal Fourth Amendment probable cause considerations inapplicable. Although conceding that a "seizure" of the luggage had occurred, the majority held that only a "reasonable suspicion" is necessary for the seizure of the luggage and found such suspicion to exist.

The dissenting Judge, Circuit Judge Dorothy Nelson, noting that "this Circuit breaks new Constitutional ground in a troublesome interpretation of Fourth Amendment law," disagreed and pointed to decisions of the United States Supreme Court and Ninth Circuit which have established precedent in direct contradiction to the majority rationale

and holding. The dissenting Judge noted that the majority approach, in dispensing with a probable cause requirement for the seizure of "inanimate objects," was "a profound departure from both Supreme Court and Ninth Circuit precedent. . ." The dissent also concluded that the seizures of Petitioners and their luggage were part of a "single unified police action" and the majority consideration of the seizure of the luggage, separate and apart from the seizure of the Petitioners, was a "unique approach to Fourth Amendment adjudication." (The Opinion of the Court of Appeals, entered on August 31, 1981 is reported as 654 F.2d 1356; see Appendix "A").

On January 13, 1982, the Court of Appeals Panel voted to deny the Petition for Rehearing and to reject a Suggestion for Rehearing en banc. Judge Nelson

voted to grant Rehearing en banc. (See Appendix "C").

REASONS FOR GRANTING THE WRIT

I

The Majority Opinion Enunciation Of New Fourth Amendment Doctrine Providing For the Warrantless Seizure Of Inanimate Objects, Absent Probable Cause, Is Unprecedented And In Conflict With Traditional Fourth Amendment Doctrine.

As dissenting Judge Nelson noted, the majority opinion broke "new constitutional ground in a troublesome intrepretation of Fourth Amendment law." Confronted with the fact that DEA agents had "seized" the Petitioners, and their luggage, as they were boarding their flight, at a time when probable cause had admittedly not been developed, the majority disregarded previously established Fourth Amendment concepts and

developed new doctrine to uphold the warrantless seizure of the suitcases: the seizure of inanimate objects may be conducted without a warrant, and without probable cause, and need only be supported by a "reasonable suspicion."[3] The majority, citing no authority, determined that the probable cause requirement for the seizure of persons, as enunciated by this Court in Dunaway v. New York, 442 U.S. 200 (1979), is inappropriate as applied to

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3/ The majority also analyzed the seizure of the suitcases separately and apart from the seizure of the Petitioners when, in fact, the seizures were simultaneous and part of a single, unified police action. There is no authority for this type of bifurcated analysis. The seizure of personal effects, such as luggage, certainly contributes to the determination of whether a reasonable person would feel free to go, therefore, must be considered as part of the police action seizing the person. See United States v. Beck, 598 F.2d 497, 500 (9th Cir. 1979).

inanimate "things", because of the lesser intrusion involved with objects as opposed to persons. This concept is contrary to established Fourth Amendment principles.

The majority placed the seizure of personal "effects" on different Constitutional footing than the search of such effects, requiring a lesser standard for the seizure. The majority apparently concedes probable cause is necessary for the search of effects (as well as the seizure of persons). However, no such distinction between search and seizure is found within the confines of the Fourth Amendment, which applies equally to the searches and seizures of persons and effects. It provides that the "right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no

warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized . . ." (emphasis supplied). The Constitutional distinction between search and seizure, and the seizure of persons and things, which appears in the majority rationale, is not present in the wording of the Fourth Amendment.[4]

Nor is it present in case law. The per se rule which makes searches conducted outside the judicial process, without prior approval by Judge or Magistrate, per se unreasonable under the Fourth

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4/ This Court recently noted, "the (Fourth) Amendment protects people and their effects, and protects those effects whether they are 'personal' or 'impersonal'." Robbins v. California, 69 L.Ed.2d 744, 750 (1981).

Amendment, subject to a few specifically delineated exceptions, is equally applicable to seizures. The Court, in Coolidge v. New Hampshire, 403 U.S. 443 (1971), made this rule clear when it noted the seizure of an immobile vehicle, with probable cause, but without a warrant, did not fit any specific exceptions to the warrant requirement thereby invalidating the subsequent search of the vehicle. This Court has also made it clear that traditional Fourth Amendment considerations protect a citizen against a variety of intrusions, including the seizure of his property. Katz v. United States, 389 U.S. 347, 350 n.4 (1950).

Recently, this Court, in Arkansas v. Sanders, 447 U.S. 753 (1979), took note of the fact that probable cause requirements apply to the seizure of luggage contained within a vehicle.

This Court stated:

> "The police acted properly -- indeed commendably -- in apprehending Respondent and his luggage. They had ample probable cause to believe that Respondent's green suitcase contained marijuana . . . having probable cause to believe that contraband was being driven away in the taxi, the police were justified in stopping the vehicle, searching it on the spot, and seizing the suitcase they suspected contained contraband." (emphasis supplied) Id., at 761.

Thus, this Court continues to recognize that probable cause, and exigencies, are necessary prerequisites to the warrantless seizure of personal effects. As stated in Sanders, supra, "(l)uggage is a common repository for one's personal effects, and therefore is inevitably associated with the expectation of privacy." Id., at 762. The expectation of privacy in luggage has been continuously reaffirmed. See United States v. Chadwick, 433 U.S. 1 (1978); Robbins v. California, ____

U.S. ___, 69 L.Ed.2d 744 (1981).

The majority attempts to find precedent for its novel holding that only a "reasonable suspicion" need exist for the seizure of inanimate objects in United States v. Van Leeuwen, 397 U.S. 249 (1970). This reliance is misplaced. Van Leeuwen deals with the temporary delay of first-class mail which was voluntarily surrendered to Government officials. The Van Leeuwen Court made no indication in its opinion that the case was designed to have any application outside of the mail context. It is unlikely to think that the Van Leeuwen Court would dispense with the probable cause and warrant requirements in a broad range of cases without an extended discussion of the careful balancing of interest that would lead to such a result. Additionally, there was no seizure infringing on a Fourth

Amendment right in Van Leeuwen. It is highly doubtful that the Van Leeuwen rational would apply if a police officer accosted an individual on the street and required him to turn over all his mail contained within his pockets based on a "reasonable suspicion."[5] To hold that the seizure of all inanimate objects (e.g., luggage, purses, wallets, vehicles) may be accomplished without warrant, probable cause or exigent circumstances is a radical and erroneous departure from pre-existing Fourth Amendment principles and Supreme Court decisions. This departure, in such an important

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5/ It is noteworthy that two Circuits, the Fifth and the Ninth, have expressly rejected the application of Van Leeuwen to the seizure of luggage from individuals. See United States v. Hunt, 496 F.2d 888, 893 (5th Cir. 1974); United States v. O'Connor, ___ F.2d ___ (9th Cir. October 5, 1981; Slip op. 4978).

area of Fourth Amendment law, requires the Court to exercise its power of supervision and grant Petitioners' Writ.

II

The Majority Opinion Has Created A Conflict of Decisions Within the Ninth Circuit And Has Created Conflict Between The Ninth And Second Circuits.

The Ninth Circuit, prior to its opinion in this cause, had clearly established the necessity of probable cause to seize effects, and more specifically luggage, in the cases of United States v. Allard, 634 F.2d 1182 (9th Cir. 1980) and United States v. Allen, 644 F.2d 749 (9th Cir. 1980).

In Allard, police officers entered a hotel room and secured it for the purpose of maintaining the status quo while a search warrant was obtained. This Court determined that once the

room had been secured, during the two hours the officers awaited the warrant, the room and its contents were seized. (emphasis original) Id., at 1186. This Court applied traditional Fourth Amendment principles to the seizure of the contents of the room and noted the absence of any exigent circumstances which would justify the seizure. The Court reasoned that this analysis should apply because:

> "(A)dequate deterrance of unlawful police activity requires suppression under these circumstances unless the government can demonstrate that the seizure made no practical difference. Any other holding would encourage law enforcement to "secure" or seize places and things with or without probable cause in the absence of a warrant or exigent circumstances while they seek some independent evidentiary basis to justify a search warrant. Such post hoc justifications are alien to the Fourth Amendment warrant and reasonableness requirements." (emphasis supplied.) Id., at 1187.

The Court went on to hold that the subsequent search warrant was invalid due to the prior illegal seizure, absent probable cause or warrant, of the contents of the hotel room, stating:

> "Accordingly, we hold that where a defendant establishes that the government illegally 'secured' and thereby seized evidence, and that seizure continues while the government procures a search warrant, the defendant has demonstrated a sufficient nexus between the illegality and subsequently seized evidence . . ." Id., at 1187.

This Circuit clearly held that traditional probable cause and warrant considerations apply to the seizure of evidence and things, and an initial illegal seizure, unsupported by probable cause or warrant, will invalidate a subsequent search warrant relating to the same evidence.

In Allen, a case extremely similar to that at bar, the defendant conformed to the "airport drug carrier profile"

in several respects. When he deplaned in Seattle, he was approached by two DEA agents. He was requested to produce identification and was informed he was the subject of a narcotics investigation. Allen became nervous. The agents asked Allen to accompany them to the Port of Seattle Police Station on the second floor of the building and he did. Once at the police station, the agents asked Allen if they could search a leather briefcase he was carrying. He refused. A DEA agent seized the briefcase.

This Court held the warrantless seizure of the defendant's briefcase was lacking in probable cause and therefore illegal, tainting the subsequent search warrant based on admissions made by the defendant after the seizure of the briefcase. Thus, this Circuit recognized the need for probable cause to sustain

the "seizure" of a piece of luggage from an individual. See Allen, supra, at 751-752.

Subsequent to the rendering of the decision in this cause, the Ninth Circuit decided United States v. O'Connor, ____ F.2d ____, slip. op. 4978 (9th Cir. October, 5, 1981). In a unanimous decision, the Ninth Circuit rejected the new doctrine enunciated in Martell, requiring probable cause to exist before a briefcase could be seized from an individual.[6] The O'Connor Court specifically rejected a government argument that a detention of a briefcase, i.e., an inanimate object, may be based on less than probable cause. The O'Connor Court stated:

6/ Although O'Connor was decided six weeks after Martell, the Martell Opinion was never discussed by the O'Connor Court.

"We reject the government's inital argument that because the agents merely detained the briefcase temporarily pending the application for a warrant to search it, the seizure can be justified on less than probable cause. The government confuses the probable cause requirement with that of exigent circumstances justifying a search without a warrant. Both a search and seizure require the same quantum of probable cause. Probable cause, alone, however justifies neither a search or seizure without a warrant in the absence of exigent circumstances. In this case there were exigent circumstances to seize the briefcase, because it might have disappeared while agents obtained a warrant, but there were no exigent circumstances that would justify a search. Seizure of items such as briefcases or luggage do not justify the added invasion of privacy involved in a search, unless the warrant is secured from a disinterested magistrate or exigent circumstances require an immediate search. The government relies upon United States v. Van Leeuwen, 397 U.S. 249, 90 S.Ct. 1029, 25 L.Ed.2d 282 (1970). In Van Leeuwen, a police officer and postal clerk temporarily detained two packages placed in the mail pending an investigation which provided probable cause to obtain a search warrant. We believe that Van Leeuwen is clearly distinguishable for the reasons expressed by the Fifth Circuit in United States v. Hunt, 496

F.2d 888, 893 (5th Cir. 1974):

> In Van Leeuwen, however, the policeman merely removed the suspected parcels from the normal flow of the mails when they were initially deposited, and replaced them after inspection in order for them to proceed on to their destination. In the instant case, the boxes were not simply removed from the normal flow of the mails, but were seized after they had reached their destination, were claimed by defendant Kolb and two of the boxes were actually in his physical possession while the remaining four were in the process of being loaded on his truck. It was not until the boxes were actually within the recipient's possession, or at least his control, that the government agents made their move and seized them. This difference, we think, takes the seizure of the six boxes outside the scope of the temporary detention recognized in Van Leeuwen. Id., at 4983 n.6.

Moreover, neither Arkansas v. Sanders, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979) nor United States v. Chadwick, 433 U.S. 1, 97 S.Ct. 2476, 53 L.ed 538 (1977), provide support for the government's rather novel theory that an item may be seized without probable cause

pending an application for a search warrant. Id., at 4983 n.6. Thus, the holding of the majority in the instant cause is in direct conflict with previously existing and subsequent decisions and doctrine of the Ninth Circuit. A clear conflict of decisions, in an immensely important area of the Fourth Amendment doctrine, has been created within the Ninth Circuit.

Additionally, and also subsequent to the Martell decision, the Second Circuit has addressed the same issue in United States v. Place, 660 F.2d 44 (2nd Cir. 1981). The Second Circuit also held that the detention of luggage, albeit for a longer period of time than that in the instant cause, on less than probable cause, violated the Fourth Amendment. The Place Court noted:

> "It may be argued that a different standard of reasonableness should apply to a detention of baggage than that of a person, on the theory that the inconvenience to the owner from seizure of his baggage may be less than when he is personally arrested without a warrant and that the intrusion is less severe. But the Fourth Amendment does not draw any distinction between an unlawful seizure of a person and the similar seizure of his property." Id., at 51.

The holding of the majority in the instant cause has not only created new Fourth Amendment doctrine, without any precedent, but has created a distinct and clear conflict within the Ninth Circuit and between the Ninth Circuit (in Martell) and the Second Circuit.[7] The seizure of luggage or inanimate objects, by law enforcement officers is an everyday occurrence in the Ninth

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7/ Counsel for Petitioners has been advised that the United States is seeking a Writ of Certiorari to the Second Circuit in United States v. Place, supra.

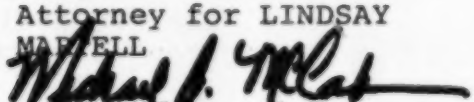
Circuit. This Court should grant Petitioners' Writ so that the reigning confusion that exists in the Ninth Circuit with regard to the applicable standard for the seizure of inanimate objects may be resolved.

CONCLUSION

For the foregoing reasons, Petitioners LINDSAY MARTELL and JOSEPH MINNECI pray that a Writ of Certiorari issue to review the ruling of the United States Court of Appeals for the Ninth Circuit to resolve the questions presented herein.

Respectfully submitted,

FRANK T. VECCHIONE
Attorney for LINDSAY MARTELL



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PROOF OF SERVICE

I, Frank T. Vecchione, hereby declare:

I am a citizen of the United States of America, over the age of eighteen years, and not a party to the within action.

My business address is 108 Ivy Street, San Diego, California 92101.

On March 15, 1982, I placed in an envelope with postage prepaid, a copy of PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT to the following:

The Honorable Rex E. Lee
Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

I declare under the penalty of perjury that the foregoing is true and correct.

Executed this 15th day of March, 1982 at San Diego, California.

Frank T. Vecchione

FRANK T. VECCHIONE

UNITED STATES OF AMERICA,

Plaintiff and Appellee,

v.

LINDSAY MARTELL,

Defendant and Appellant.

UNITED STATES OF AMERICA,

Plaintiff and Appellee,

v.

JOSEPH MINNECI,

Defendant and Appellant.

Nos. 80-1163, 80-1154

United States Court of Appeals,
Ninth Circuit.

On Appeal from the
United States District Court
for the Southern District of California
The Honorable Howard B. Turrentine
District Judge, Presiding

Argued and Submitted Oct. 9, 1980.

Decided Aug. 31, 1981.

Before: FARRIS and NELSON, Circuit Judges,
and CURTIS,* District Judge.

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* Honorable Jesse W. Curtis, United States District Judge, Central District of California, sitting by designation.

APPENDIX "A"

CURTIS, District Judge:

Appellants Martell and Minneci were convicted of "conspiracy to possess cocaine with intent to distribute" and "possession of cocaine with intent to distribute" in violation of Title 21 U.S.C. Sections 841(a)(1) and 846. They appeal from an order of the trial court refusing to suppress as evidence narcotics seized at the time of their arrest. Finding that the motion was properly denied, we affirm.

I. FACTUAL BACKGROUND

On September 30, 1979, DEA agent Charles Kenerson, based in San Diego, received a telephone call from a DEA agent in Anchorage, Alaska. Kenerson understood the other agent to say that two subjects, one a known drug trafficker (Martell) who had been arrested eight months earlier with approximately a pound of cocaine and $109,000 in cash[1] had

[1] Although this information was given in good faith, it was in error in that it was not Martell but an associate of his who had been arrested.

made arrangements to fly from Anchorage to San Diego. Martell was traveling under the name of A. Brewer.

Kenerson and other agents began surveillance of the San Diego airport on September 30, 1979. Minneci arrived that night carrying two suitcases. He was observed making two calls, and then taking a cab to the Sheraton Harbor Island Hotel. Martell arrived at 7:10 the next morning, made a phone call to the Sheraton and proceeded directly there, checking in under the name of Martell.

At about 9:45 a.m. Martell was observed leaving the hotel with an unidentified male in a white Toyota pickup truck which was then driven in a somewhat erratic manner, known to the agents as being a method of discovering and avoiding any possible surveillance. It then returned to the hotel within five minutes, whereupon Martell reentered the hotel and proceeded to the third floor. Ten minutes later Minneci was observed making telephone calls, after which he went to Martell's room

on the third floor.

At 11:30 a.m. Minneci and Martell left the hotel, went back to the airport and purchased tickets under the names of Minneci and Taylor on a 12:20 p.m. Western Airlines flight to Anchorage. After purchasing their tickets they left their suitcases in the security area and went back outside the security area to have a drink. At 11:40 a.m., DEA agents sent for a narcotics detector dog. At about 12:10 p.m., Martell and Minneci were detained by DEA agents as they approached the boarding area. The agents identified themselves and stated that they were conducting a narcotics investigation. There was testimony by the agents that they had intended to detain the subjects when they approached them, and that the subjects were not free to board their flight. In Martell's case an agent testified that this was made clear to Martell by, inter alia, the fact that his flight left in five minutes. In Minneci's case there was testimony that his ticket was seized. The agents asked

for permission to search the suitcases, which Martell and Minneci refused.

At about 12:30 (twenty minutes later) Martell, Minneci and their luggage were escorted downstairs to the Harbor Police Office (about a one-minute walk) where a narcotics detector dog (Duster) was allowed to "sniff" the luggage. In response to a question about precautions taken by the agents against escape attempts by the subjects while on the way downstairs, there was testimony that the only precaution was that the subjects were surrounded by agents. After Duster gave positive alert for narcotics in the suitcases, Martell and Minneci were transported to the Narcotics Task Force office in the east end of the airport. It was at the time of the alert that the trial court held probable cause first arose. The subjects were detained there for four hours until a search warrant was obtained, at which time the suitcases were searched and a large quantity of cocaine found, whereupon appellants

were arrested.

II. APPELLANTS' CONTENTION

Appellants argue that their twenty-minute detention by the DEA agents constituted an illegal arrest unsupported by probable cause, citing the Supreme Court's recent decision in Dunaway v. New York, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979), and that the seizure of the narcotics being the poisonous fruit of an illegal arrest cannot withstand a fourth amendment challenge. Believing, as we do, that a conceptual difference exists between the detention of the appellants on the one hand, and the detention of their suitcases on the other, we focus on what we believe to be the real issue -- whether the government agents can detain the appellants' suitcases without probable cause, but upon a well founded suspicion, for twenty minutes without running afoul of the fourth amendment. We conclude that they can and that the trial court did not err in refusing to

suppress such evidence.

III. A STOP AND DETENTION OF APPELLANTS

(1) Admittedly, the agents had a well founded suspicion that the appellants were engaged in drug trafficking, thus justifying, at least, a momentary detention of them for investigative purposes. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

(2) Based upon the same reasons, the officers likewise had a well founded suspicion that the suitcases contained the narcotics; therefore, they were justified in detaining the suitcases for further investigation. United States v. Van Leeuwen, 397 U.S. 249, 90 S.Ct. 1029, 25 L.Ed.2d 282 (1970). Such a detention in both instances was a "seizure" to be judged by fourth amendment standards, for it was apparent from the moment the agents announced that a narcotic investigation was underway, they would not have permitted either the appellants to leave or their luggage to be removed during the brief investigation.

As the Terry Court points out, for fourth amendment purposes, "whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." 392 U.S. at 16, 88 S.Ct. at 1877. After referring to the difficulties other courts have experienced in attempting to distinguish between a stop not requiring probable cause, and an arrest which does, the Supreme Court said:

> "In our view the sounder course is to recognize that the Fourth Amendment governs all intrusions by agents of the public upon personal security, and to make the scope of the particular intrusion, in light of all the exigencies of the case, a central element in the analysis of reasonableness."

392 U.S. n.15 at 18, 88 S.Ct. at 1878. The Court then proceeded to balance the minimal intrusions which a momentary "stop" and "frisk" detention would cause a citizen, against the necessity of protecting the police

in their law enforcement endeavors, and held that a momentary stop for the purpose of making brief inquiry and for frisking for weapons was a reasonable seizure within the fourth amendment.

Some twelve years after Terry, the Supreme Court decided Dunaway v. New York, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979), in which it recognized Terry as an exception to the well established prohibition of arrests without probable cause, and held that because any detention by a police officer is such "a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment," the Terry exception must be narrowly construed allowing only momentary stops for on-the-spot questioning. In Dunaway, the Court specifically disapproved a detention of approximately twenty minutes, which became an in-custody interrogation.

(3) In our view, however, Terry and Dunaway and their progeny relate to detention

of persons and not inanimate objects. The rationale relied upon by the Court in those cases is inappropriate as applied to "things," a seizure of which constitutes a substantially less serious intrusion upon rights of the individual.[2]

We look then to the standard of reasonableness as required by the fourth amendment to the seizure and detention of inanimate objects.

In United States v. Van Leeuwen, 397 U.S. 249, 90 S.Ct. 1029, 25 L.Ed.2d 282 (1970),

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2 The "seizure" issue in this case is distinguishable from the "search" issue in Ybarra v. Illinois, 444 U.S. 85, 100 S.Ct. 338, 62 L.Ed.2d 238 (1979). In that case, police while executing a search warrant for a public tavern detained and searched all of the customers present. No question was raised as to the legality of the detention, but the Court held the search invalid, as the police had no basis to suspect that the customers were in any way involved in illegal activity.

In this case, we are concerned only with "detention" where the agents have a well founded suspicion that the defendants and their luggage were involved in illegal activity.

the Supreme Court recognized the propriety of detaining inanimate objects without probable cause when "reasonable suspicion existed" that they were included in a scheme of criminal activity. In that case two twelve pound packages of coins sent by first-class mail were stopped and delayed for more than a day because government agents suspected they were part of an illegal coin importation system. Speaking for a unanimous Court, Justice Douglas acknowledged the sanctity of a citizen's fourth amendment privacy interest in sending objects through first-class mail, but added, "Yet even first-class mail is not beyond the reach of all inspection; and the sole question here is whether the conditions of its detention and inspection had been satisfied." Id. at 252, 90 S.Ct. at 1032. After pointing out that the officers had justifiable suspicion about these packages of coins, the Court approved their removal from the flow of the mail without a warrant while a brief investigation was being completed.

(4) Although the length of time during which appellants' luggage was detained is a relevant factor when considered in the light of all the surrounding circumstances in determining whether such an intrusion is permissible under fourth amendment standards, we know of no case which has placed an outer time limit on the detention of impersonal objects such as Dunaway placed upon the detention of persons. As the Court said in Van Leeuwen:

> "Theoretically -- and it is theory only that respondent has on his side -- detention of mail could at some point become an unreasonable seizure of 'papers' or 'effects' within the meaning of the Fourth Amendment. Detention for 1½ hours -- from 1:30 to 3 p.m. -- for an investigation certainly was not excessive; . . ." Id.

(5) In any event, in the case before us, the suitcases were detained for only twenty minutes awaiting the arrival of a police dog, a period of time well within that allowed in Van Leeuwen. It was the dog's signal that

the luggage contained narcotics which provided probable cause upon which a warrant was then issued pursuant to which the suitcases were searched and the appellants arrested. In our view such a detention under these facts does not offend constitutional standards.

The dissent finds this holding a startling departure from the fourth amendment's prohibition against warrantless seizures without probable cause, a precept which the dissent apparently considers inviolate and inflexible. However, the fourth amendment addresses itself only to "unreasonable searches and seizures" and the books are replete with cases wherein, for a variety of reasons, warrantless searches without probable cause have been held not unreasonable.

For example, border searches have generally been recognized as permissible even though without warrant or probable cause, and even where there has been no justifiable suspicion of illegality. Although specifically allowed by statute, such searches must

still pass constitutional muster. Such searches have been upheld not as "exceptions to the rule," but as being reasonable in the light of the government's sovereign right to protect its borders. United States v. Ramsey, 431 U.S. 606, 97 S.Ct. 1972, 52 L.Ed.2d 617 (1977).

Furthermore, administrative searches have been upheld without warrant, without probable cause, and without a reasonable suspicion of the illegality where they serve as a part of some governmental regulatory scheme. United States v. Biswell, 406 U.S. 311, 92 S.Ct. 1593, 32 L.Ed.2d 87 (1972) (upheld a search of a licensed firearm dealer's storeroom as part of inspection procedures authorized by the Gun Control Act of 1968); Wyman v. James, 400 U.S. 309, 91 S.Ct. 381, 27 L.Ed.2d 408 (1971) (upheld entry into leased premises as part of a routine annual inspection by city housing inspectors to determine compliance with city codes); United States v. Schafer, 461 F.2d 856 (9th Cir. 1972)

(upheld the search of an air traveler's luggage as part of a screening inspection of all luggage and personal effects of aircraft passengers leaving Hawaii to prevent exportation of plants, pests and diseases).

Warrantless searches without probable cause have been upheld when required as a condition for entering aircraft or public buildings as a part of a regulatory scheme to assure public safety. Downing v. Kunzig, 454 F.2d 1230 (6th Cir. 1972) (upheld the search of a briefcase for weapons and explosives pursuant to a rule conditioning entry into a federal building upon submission to such a search).

The courts in these cases have not considered their rulings as exceptions to the general constitutional prohibition against warrantless searches without probable cause. These decisions are bottomed upon the concept that in the light of all the circumstances the searches are not unreasonable by constitutional

standards.[3]

In Van Leeuwen, which the dissent brushes aside as having no application outside the mail context, the Court made no pretense of carving out a brand new exception to the fourth amendment. Instead it merely held

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[3] In Michigan v. Summers, ___ U.S. ___, 101 S.Ct. 2587, 69 L.Ed.2d ___ (1981), after citing Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 1.Ed.2d 889 (1968); Adams v. Williams, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972); United States v. Brignoni-Ponce, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975), and United States v. Cortez, ___ U.S. ___, 101 S.Ct. 690, 66 L.Ed. 2d 621 (1981), the Court commented:

> These cases recognize that some seizures admittedly covered by the Fourth Amendment constitute such limited intrusions on the personal security of those detained and are justified by such substantial law enforcement interests that they may be made on less than probable cause, so long as police have an articulable basis for suspecting criminal activity. In these cases, as in Dunaway, the Court was applying the ultimate standard of reasonabless embodied in the Fourth Amendment. (Footnote omitted.) They are consistent with the general rule that every arrest, and every seizure having the essential attributes of a formal arrest, is unreasonable unless it is supported by probable cause. But they demonstrate that the exception for limited intrusions that may be justified by special law enforcement interests is not confined to the momentary, on-the-street detention accompanied by a frisk for weapons involved in Terry and Adams. (Footnote omitted). ___ U.S. at ___, 101 S.Ct. at 2592.

that under those suspicious circumstances a warrantless seizure without probable cause was not unreasonable.

Furthermore, the dissent calls our attention to United States v. Allen, 644 F.2d 749 (9th Cir. 1980), a case recently decided by this court, holding that the warrantless seizure of a briefcase without probable cause violated the fourth amendment. However, that case is clearly distinguishable from the one at bar. The sole issue there was whether the district court's finding of probable cause was supported by the evidence. We held that the evidence there was insufficient to uphold such a finding. In that case, we specifically refused to address the question of whether or not the agent had a "founded suspicion." In the case before us, however, the district court found that the agent had such "founded suspicion" when defendants were stopped and, consequently, at the time the bags were seized, and the facts before us are more than sufficient to support such a finding.

V. EFFECT OF UNLAWFUL ARREST

(6) If the detention of the appellants became an unlawful arrest by reason of the length of time they were detained,[4] it has importance in this case only if the detention during the unlawful period contributed in some fashion to the search and seizure of the narcotics. Since the agents conducted no interrogation of the appellants during the unlawful portion of their detention, the agents gained nothing that they had not already learned during the permissible portion of their detention. Consequently, even assuming the arrest to be unlawful by reason of the detention of the appellants for an excessive period of time, it would not taint the search and seizure of the suitcases.

The concept of evaluating evidence in detention cases, depending upon whether

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[4] We specifically refrain from deciding whether the detention of the defendants personally exceeded the limits established by Terry and Dunaway.

evidence was obtained before or after the detention became unlawful, has been clearly recognized in this and other circuits. In United States v. Chamberlin, 644 F.2d 1262 (9th Cir. 1979), the officers made an investigatory stop and asked the suspect several questions. The detention ultimately became an unlawful arrest. Upon motion the court, while excluding the statements made by the defendant after the arrest became unlawful, admitted statements made by the defendant in the early stages of the arrest when its illegality could not be questioned.

In United States v. Mayes, 524 F.2d 803 (9th Cir. 1975), the court was considering a border search which was legal in its inception, but which later became an unlawful detention. Acting upon information which they obtained from the suspect when first interrogated, the agents detained the suspect while the original information was being verified. As a result, the agents obtained evidence sufficient to justify the issuance of the

search warrant. The court held that even though the lengthy detention of the suspect was illegal, such detention did not taint the seizure of the contraband found as a result of following the lead given by the suspect during the first part of the confrontation when his detention was lawful. In denying the motion to suppress, the court said:

> ". . .(E)ven if the detention was unconstitutional, it was unrelated to the discovery of the cache. No evidence gained during Mayes' detention led to the cache of marijuana. The only evidence from Mayes that they relied upon was the shape of his boot print and his improbable story that he was robbed in Tijuana. Both were obtained during the short time -- approximately five minutes -- that he was questioned at Jewel Valley Road. Detention for this brief time undoubtedly was justified by Mayes' improbable account of being robbed in Tijuana, Terry v. Ohio,

392 U.S. 1, 20-23 (88 S.Ct. 1868, 1879-1881, 20 L.Ed.2d 889) (1968) (other cites omitted). We conclude that the cache of marijuana was discovered without reliance upon any allegedly illegal police conduct. This discovery produced probable cause for an arrest of Mayes."

524 F.2d at 806.

In United States v. Klein, 626 F.2d 22 (7th Cir. 1980), the court confronted a factual situation almost identical with the facts before us. Officers having a well founded suspicion detained defendants at an airport and seized their bags. Although the suspects were told they were free to go, subsequent police conduct resulted in what all parties agreed was an unlawful arrest. The bags were detained until a canine narcotic detector was obtained which furnished the basis for a search warrant. The court, in reliance upon Van Leeuwen, held "that at the time they decided to detain the bags while waiting for a canine trained in

drug detection, the DEA agents had reasonable suspicion to believe that the bags contained contraband; they would have been remiss in not detaining the bags for further investigation. . . . (T)hey did not search the defendants' luggage until after probable cause had been established and after they had obtained a search warrant, . . ." 626 F.2d at 26.

More recently, the first circuit reached a similar conclusion in United States v. Viegas, 639 F.2d 42 (1st Cir. 1981). The facts in this case are strikingly similar to those in the case before us. In both cases reasonable suspicion existed at the outset, both as to the suspects and their suitcases. In both cases the suspects were not interrogated during the detention of their bags, and in both cases the bags were not opened until a search warrant was obtained after the dog gave positive alert signs indicating the presence of drugs in the bags. Under these facts, the court affirmed the lower court's

denial of a motion to suppress.

Our ruling here does not erode appellants' right to privacy as protected by the fourth amendment. As the Court pointed out in Van Leeuwen:

> "The only thing done here on the basis of suspicion was detention of the packages. There was at that point no possible invasion of the right 'to be secure' in the 'persons, houses, papers, and effects' protected by the Fourth Amendment against 'unreasonable searches and seizures. . . .'
>
> No interest protected by the Fourth Amendment was invaded by forwarding the packages the following day rather than the day when they were deposited. The significant Fourth Amendment interest was in the privacy of this first-class mail; and that privacy was not disturbed or invaded until the approval of the magistrate was obtained."

397 U.S. at 252-53, 90 S.Ct. at 1032.

Therefore, we hold no fourth amendment right was invaded here for the suitcases were

detained upon a well founded suspicion that they contained narcotics, and their detention for approximately twenty minutes awaiting the police dog was not unreasonable. The actual search of the contents of the bags did not occur until after a valid search warrant had been obtained.

Accordingly, we affirm.

NELSON, Circuit Judge, dissenting:

Today this Circuit breaks new constitutional ground in a troublesome interpretation of fourth amendment law. Going beyond even the First Circuit in United States v. Viegas and the Seventh Circuit in United States v. Klein, the majority finds in a Supreme Court case concerned with the delay of mail the authority to justify seizure of a suitcase -- seizure not only without a warrant but without even probable cause. Furthermore, in order to apply this new doctrine, the majority must disregard the simultaneous unlawful arrest of the defendants. In examining the seizure of the

suitcases as a separable, independent action, the majority seeks to legitimize part of what was clearly a single, integrated instance of unconstitutional police conduct. I must respectfully dissent. While I can understand, and indeed share, the reluctance of the majority to release these defendants when the police conduct involved seems so "reasonable," we cannot ignore the doctrinal framework of decided fourth amendment law in search of a particular result.

I. SEIZURE OF THE SUITCASES

The majority's analysis begins by indicating that the "real issue" here is whether government agents could "detain" the suitcases without probable cause for twenty minutes. In Section III, the majority tells us that a stop and detention of the appellants was justified by Terry. The "detention" of the suitcases, which the majority acknowledges to be a fourth amendment seizure, is supposedly justified independently under Van Leeuwen. While the Supreme Court in Dunaway

made it clear that the Terry exception was a narrow one, the majority avoids the force of this stricture by stating that "Terry and Dunaway and their progeny relate to detention of persons and not inanimate objects." The seizure and detention of the suitcases is not subject to the same restrictions, we are told, and is therefore to be analyzed under a general standard of reasonableness under Van Leeuwen. To understand why such an approach is a profound departure from both Supreme Court and Ninth Circuit precedent, we must first look to some basic fourth amendment principles.

a. Fourth Amendment Principles

We start with the proposition that the Fourth Amendment applies equally to searches and to seizures. It provides that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the

place to be searched, and the persons or things to be seized. . . .

A search and seizure question therefore begins with the proposition that "the most basic constitutional rule in this area is that 'searches (and seizures) conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment -- subject to a few specifically established and well delineated exceptions.'" Coolidge v. New Hampshire, . . . 403 U.S. (443) at 454-55, (91 S.Ct. 2022, at 2031,2032, 29 L.Ed.2d 564), quoting Katz v. United States, 1967, 389 U.S. 347, 357 (, 88 S.Ct. 507, 514, 19 L.Ed.2d 576) . . . . United States v. McCormick, 502 F.2d 281, 285 (9th Cir. 1974) (bracketed language in McCormick).[1] "Unless a warrantless search

[1] Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971), made it clear that the long standing Katz per se rule applied to seizures as well as searches. In part II C of that opinion, the Court discussed the state's argument that a seizure and subsequent search of an automobile with probable cause but without a warrant was

or seizure meets one of these exceptions, the evidence thereby obtained is inadmissible at trial." United States v. Jamerson, 549 F.2d 1263, 1270 (9th Cir. 1977). See United States v. Allard, 634 F.2d 1182, at 1184-1187 (9th Cir. 1980).

The majority takes a different approach, concluding that the prohibition against warrantless searches and seizures is not a per se rule subject to only limited exceptions. It states that "the books are replete with cases wherein, for a variety of reasons,

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still justified under the "plain view" exception to the warrant requirement. The Court concluded that the seizure did not fit the exception, and noted that consideration of the legality of the subsequent search was thus unnecessary. 403 U.S. at 464-65, 91 S.Ct. at 2037. Thus there can be no doubt that it was the failure to find an exception to justify the warrantless seizure that gave rise to a fourth amendment violation at that point, without regard to the subsequent search. See United States v. Edwards, 415 U.S. 800, 802, 94 S.Ct. 1234, 1236, 39 L.Ed.2d 771 (1974) ("The prevailing rule under the Fourth Amendment that searches and seizures may not be made without a warrant is subject to various exceptions." Here a warrantless seizure of clothing was upheld as pursuant to a lawful arrest.)

warrantless searches without probable cause have been held not unreasonable," and offers as examples a number of recent decisions. The searches in these cases were not justified, according to the majority, "as exceptions to the general constitutional prohibition against warrantless searches without probable cause. These decisions are bottomed upon the concept that in the light of all the circumstances the searches were not unreasonable by constitutional standards."

This notion goes to the heart of my disagreement with the majority. Two considerations persuade me that it does not correctly state fourth amendment law. First, it is impossible to square with the repeated statements by the Supreme Court on the subject of the warrant requirement. See, e.g., Schneckloth v. Bustamonte, 412 U.S. 218, 219, 93 S.Ct. 2041, 2043, 36 L.Ed.2d 854 (1973); Coolidge v. New Hampshire, 403 U.S. 443, 454-55, 91 S.Ct. 2022, 2031-32, 29 L.Ed.2d 564 (1971); Katz v. United States, 389 U.S. 347,

357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576 (1967); United States v. McCormick, 502 F.2d 281, 285 (9th Cir. 1974). Second, and perhaps more significantly, the very cases cited by the majority did not actually turn on, nor do they support, any such "reasonableness in light of all the circumstances" rationale. See United States v. Ramsey, 431 U.S. 606, 621, 97 S.Ct. 1972, 1981, 52 L.Ed.2d 617 (1977) (Rehnquist, J.) ("(T)he 'border search' exception. . . is a longstanding, historically recognized exception to the Fourth Amendment's general principle that a warrant be obtained, and in this respect is like the similar 'search incident to lawful arrest' exception treated in United States v. Robinson, 414 U.S. 218, 224, 94 S.Ct. 467, 471, 38 L.Ed.2d 427 (1973)."); Marshall v. Barlow's, Inc., 436 U.S. 307, 313, 98 S.Ct. 1816, 1820, 56 L.Ed.2d 305 (1978) ("The Secretary urges that an exception from the search warrant requirement has been recognized for 'pervasively regulated business(es),' United States v. Biswell, 406 U.S. 311, 316,

92 S.Ct. 1593, 1596, 32 L.Ed.2d 87 (1972), and for 'closely regulated' industries 'long subject to close supervision and inspection.' Colonnade Catering Corp. v. United States, 397 U.S. 72, 74, 77, 90 S.Ct. 774, 775, 777, 25 L.Ed.2d 60 (1970). These cases are indeed exceptions, but they represent responses to relatively unique circumstances."); Wyman v. James, 400 U.S. 309, 317, 91 S.Ct. 381, 385, 27 L.Ed.2d 408 (home visit required for AFDC eligibility not a search); United States v. Schafer, 461 F.2d 856, 858 (9th Cir.), cert. denied, 409 U.S. 881, 93 S.Ct. 211, 34 L.Ed.2d 136 (1972) (even in administrative search context, "(t)he proposition is firmly established that 'except in certain carefully defined classes of cases, a search of private property is "unreasonable" unless it has been authorized by a valid search warrant.'" quoting Camara v. Municipal Court, 387 U.S. 523, 529, 87 S.Ct. 1727, 1731, 18 L.Ed.2d 930 (1967); McMorris v. Alioto, 567 F.2d 897, 899 (9th Cir. 1978) ("Those cases that sustained limited searches of persons

seeking to enter sensitive facilities recognize an exception to the general requirement that searches are proper only if conducted pursuant to a lawful warrant. United States v. Davis, 482 F.2d 893 (9th Cir. 1973); Downing v. Kunzig, 454 F.2d 1230 (6th Cir. 1972).")[2] Fourth Amendment questions continue to be analyzed according to the principles set forth in such cases as Coolidge and Katz.

There is no question that, although the majority often chooses to use the word "detention," there was a seizure of the suitcases here. Because there was no warrant, the majority must point to an exception to the warrant requirement that would justify a seizure under circumstances where, as here, the police not only lack the judicial

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[2] The majority also looks for support to Michigan v. Summers, ___ U.S. ___, 101 S.Ct. 2587, 69 L.Ed.2d ___ (1981). Summers, like Terry and Dunaway, is a case dealing with the detention of people, and thus provides no further support for the majority's object seizure doctrine.

determination of probable cause that is the necessary prerequisite to the issuance of a warrant, but the underlying probable cause itself. See United States v. Allen, 644 F.2d 749 (9th Cir. 1980) (finding unlawful warrantless seizure of briefcase in absence of probable cause).[3] The majority points to

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[3] The absence of probable cause at the time the DEA agents seized the suitcases marks a crucial distinction between the instant case and, e. g., Arkansas v. Sanders, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979) and United States v. Chadwick, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977). The latter cases involved seizures followed by searches of, respectively, a suitcase and a footlocker, in the absence of a warrant. In both cases, probable cause was found to exist; the crucial inquiry was whether an exception to the warrant requirement applied to relieve the police of their obligation to obtain a warrant before searching the contents of the seized items.

While the Court did not need to address the propriety of the seizures in either case, the seizure in Sanders could presumably have been justified by the presence of probable cause plus exigent circumstances, see 442 U.S. at 761, 99 S.Ct. at 2591 ("Having probable cause to believe that contraband was being driven away in the taxi, the police were justified in stopping the vehicle, searching it on the spot, and seizing the suitcase."), and the seizure in Chadwick was incident to a lawful arrest after a narcotics dog indicated the presence of contraband in the trunk of the defendants'

no such exception, and I am unable to find one. Its analysis thus seems to dispense with the Supreme Court's carefully guarded doctrinal framework in reaching this newly-announced general standard of "reasonableness as required by the Fourth Amendment in the seizure and detention of inanimate objects."

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car, see 433 U.S. at 3, 97 S.Ct. at 2479. In both cases, however, any exigency ended once the police had seized the objects to be searched and had them securely within their control. See 442 U.S. at 763, 99 S.Ct. at 2593; 433 U.S. at 13, 97 S.Ct. at 2484. Thus warrantless searches of the seized objects, even with probable cause, were impermissible.

Here, by contrast, the seizures could not be justified on a similar basis due to the lack of probable cause (or a lawful arrest). Furthermore, it is interesting to consider whether one could even argue the existence of exigent circumstances. Due to the unlawful arrest, the defendants were immobilized across the room from their suitcases. It is difficult to see what exigency remained after that time. See 442 U.S. at 763, 99 S.Ct. at 2593; 433 U.S. at 13, 97 S.Ct. at 2484. Indeed, I would challenge the use of an exigent circumstances analysis when the exigency has been removed by unlawful police action. This point helps to illustrate the difficulties inherent in the majority's analytical approach that attempts to consider the seizure of the suitcases as independent of the unlawful arrest. See Part II, infra. (cont.)

b. Van Leeuwen and Terry

For both its approach and conclusion, the majority, like the Klein and Viegas courts, relies heavily on principles it perceives in United States v. Van Leeuwen. Van Leeuwen was a case involving the detention of first class mail.[4] The opinion certainly gives no

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Notably, the Court in both Sanders and Chadwick rejected prosecution arguments that the exigent circumstances exception associated with automobiles under Carroll should be extended to validate the searches there at issue. As the Sanders Court stated:

> (B)ecause each exception to the warrant requirement invariably impinges to some extent on the protective purpose of the Fourth Amendment, the few situations in which a search may be conducted in the absence of a warrant have been carefully delineated and the "burden is on those seeking the exception to show the need for it." . . . Moreover, we have limited the reach of each exception to that which is necessary to accommodate the identified needs of society.

442 U.S. at 760, 99 S.Ct. at 2591 (citations omitted).

[4] The facts in Van Leeuwen were described by the Court in the following manner:

> Respondent, at about 1:30 p.m. on Thursday, March 28, 1968, mailed two 12-pound packages at the post office in Mt. Vernon, Washington, a town some 60 miles from the Canadian border. One package was addressed to a post office box in Van Nuys, California,

indication that it is creating a whole new branch of fourth amendment doctrine; indeed, nowhere in the opinion does the Court give any indication that the case is designed to have any

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and the other to a post office box in Nashville, Tennessee. Respondent declared they contained coins. Each package was to be sent airmail registered and each was insured for $10,000, a type of mailing that the parties agree was first class, making them not subject to discretionary inspection.

When the postal clerk told a policeman who happened to be present that he was suspicious of the packages, the policeman at once noticed that the return address on the packages was a vacant housing area of a nearby junior college, and that the license plates of respondent's car were British Columbia. The policeman called the Canadian police, who called customs in Seattle. At 3 o'clock that afternoon customs called Van Nuys and learned that the addressee of one package was under investigation in Van Nuys for trafficking in illegal coins. Due to the time differential, Seattle customs was unable to reach Nashville until the following morning, March 29, when Seattle was advised that the second addressee was also being investigated for the same crime. A customs official in Seattle thereupon filed an affidavit for a search warrant for both packages with a United States commissioner, who issued the search warrant in Mt. Vernon at 6:30 p.m., 2½ hours later. Thereupon the packages were opened, inspected, resealed, and promptly sent on their way.

397 U.S. at 249-50, 90 S.Ct. at 1029-1030.

application outside the mail context.[5] Given the doctrinal background for the Court's decision, including the long acceptance of the "familiar principle. . . that no amount of probable cause can justify a warrantless search or seizure absent 'exigent circumstances,'"

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[5] Indeed, in the eleven years since Van Leeuwen was decided, the Supreme Court has cited it only twice and this court has cited it only three times, one of which was the remand of Van Leeuwen itself. In none of these cases is there any suggestion that the principle enunciated in Van Leeuwen applies to anything other than mail. See United States v. Chadwick, 433 U.S. 1, 10, 97 S.Ct. 2476, 2482, 53 L.Ed.2d 538 (1977) (citing Van Leeuwen as holding that a search warrant was necessary to open two packages); Doe v. Bolton, 410 U.S. 179, 211, 93 S.Ct. 739, 757, 35 L.Ed.2d 201 (1973) (Douglas, J. concurring) (citing his Van Leeuwen opinion for the proposition that the first amendment protects the privacy of first class mail); United States v. Choate, 576 F.2d 165, 176 (9th Cir. 1978) (citing Van Leeuwen as support for holding that use of a mail cover, in which information on the outside of an envelope is used, was not an intrusion of a person's reasonable expection of privacy); United States v. Sadrzadeh, 440 F.2d 389, 390 (9th Cir. 1971) (cryptic citation to Van Leeuwen as providing no aid to Sadrzadeh. "Where customs is involved there must of necessity be more delay than in the ordinary transmission of the mails.").

Coolidge, 403 U.S. at 468, 91 S.Ct. at 2039, it is unlikely that the Van Leeuwen Court would think to dispense with both the probable cause and warrant requirements in a broad range of cases without an extended discussion of the careful balancing of interests that would lead to such a result. Even when the Court has taken the less significant step of setting out an exception to the warrant requirement alone, such a discussion is virtually inevitable. See, e.g., United States v. Robinson, 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973) (scope of search incident to lawful arrest); Warden v. Hayden, 387, U.S. 294, 87 S.Ct. 1642, 18 L.Ed. 2d 782 (1967) (hot pursuit); Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925) ("automobile" exception). Similarly, when the Court announced its landmark decision in Terry, and "for the first time recognized an exception to the requirement that Fourth Amendment seizures of persons be based on probable cause," Dunaway, 442 U.S. at 208, 99 S.Ct. at 2254, the Court was careful to explain

why this specially limited intrusion was not subject to the standard requirement of probable cause. See 392 U.S. at 20-27, 88 S.Ct. at 1879-1883; Dunaway, 442 U.S. at 208-210, 99 S.Ct. at 2254-2255 (discussion of Terry).

A more likely reading of Van Leeuwen would treat it not as a case creating a new type of constitutionally permissible seizures of objects, but as a case defining the level of expectation of privacy in mail which determines the extent of applicability of the fourth amendment itself. See Rakas v. Illinois, 439 U.S. 128, 140-43, 99 S.Ct. 421, 428-430, 58 L.Ed. 2d 387 (1978) (citing Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), for the proposition that capacity to claim the protection of the fourth amendment depends upon whether the person who claims the protection has a legitimate expectation of privacy in the invaded place). When one closely analyzes the Court's reasoning in Van Leeuwen, the correctness of this view becomes clear.

Justice Douglas' discussion in Van Leeuwen begins by focusing on the constitutional protections historically applicable to mail, a discussion which emphasizes security from government intrusion of the interior contents of letters and packages as a fourth amendment value and notes the important freedom of expression interests in those contents under the first amendment. 397 U.S. at 251-52, 90 S.Ct. at 1031-1032. It is from this perspective, one that views interference with the mail as interference with communication, that the Court turns to the "sole question" of whether the conditions for the detention and outward inspection of the packages had been satisfied. Id. at 252, 90 S.Ct. at 1032.

The Court next notes that the suspicious nature of the packages "certainly justified detention, without a warrant, while an investigation was made." Id.

The only thing done here was detention of the packages. There was at that point no possible

> invasion of the right "to be secure" in the "persons, houses, papers, and effects" protected by the Fourth Amendment against "unreasonable searches and seizures." Theoretically and it is theory only that respondent has on his side -- detention of mail could at some point become an unreasonable seizure of "papers" or "effects" within the meaning of the Fourth Amendment.

Id. (emphasis added).

This passage appears only to establish fourth amendment parameters for the sui generis category of mail. Surely it does not contain the sweeping proposition that any time the police seize and detain any object there is "no possible invasion" of fourth amendment rights. Rather, it is clear that the Court is saying only that the mere detention of mail, the immediate possession of which has already been voluntarily surrendered to government officials, does not necessarily constitute a fourth amendment seizure -- although in

"theory only," such a detention could at some point become an unreasonable seizure.

Van Leeuwen thus stands in sharp contrast to Terry, where the Court acknowledged that the defendant's fourth amendment interests had been intruded upon when he was seized and searched, 392 U.S. at 16-20, 88 S.Ct. at 1877-1879, but concluded that this specially limited type of intrusion was justified. In Van Leeuwen, on the other hand, the Court stated:

> No interest protected by the Fourth Amendment was invaded by forwarding the packages the following day rather than the day they were deposited. The significant Fourth Amendment interest was in the privacy of this first class mail; and that privacy was not disturbed or invaded until the approval of the magistrate was obtained.

397 U.S. at 253, 90 S.Ct. at 1032 (emphasis added). Van Leeuwen therefore can only be understood, both from its heavy emphasis on the interests in and characteristics of mail

and its cursory examination of broader fourth amendment principles, as a case concerned with the nature and extent of fourth amendment rights in mail.

Two other points buttress this conclusion. First, as mentioned above, mail is necessarily voluntarily placed in the possession of the government. The detention involved there is a significantly different type of intrusion from the type of seizure involved in the instant case, and is not surprisingly subject to a different type of analysis. The Court in Van Leeuwen was thus very careful not to use the word "seizure" in describing the treatment of the mail. Rather than a removal from the possession of an individual, this was merely an increase in the amount of time a package already in government hands remained in government hands. Second, the significant amount of detention time involved in Van Leeuwen makes broader applicability unlikely. If, as the majority holds today, Van Leeuwen constitutes

authority for a broad range of object seizures, then it would follow that in at least some circumstances, such an object could be held not merely for the twenty minutes involved in the instant case, but for at least the time permitted in Van Leeuwen -- in the area of nineteen hours from the detention to the time probable cause arose in the case of the second package -- without having invaded any interest protected by the fourth amendment.[6] Such a result cannot seriously be argued, which only illustrates how limited the applicability of Van Leeuwen must truly be.

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[6] At the very least, Van Leeuwen would permit such lengthy detentions where, because of administrative problems, such delay was not "unreasonable." In Van Leeuwen, for example, one package was detained in Washington state overnight because, due to the time difference, it had been received too late in the day to contact federal officials in Tennessee. The Court termed this delay "unavoidable." See 397 U.S. at 253, 90 S.Ct. at 1032. A comparable argument could be made in the instant case, presumably, if the kennel housing the narcotics dog had been closed for the night, so that the dog would not be available until the following day.

In short, I find very little support for the majority holding. In contrast with Van Leeuwen, where "(n)o interest protected by the Fourth Amendment" was infringed, it is undeniable that fourth amendment interests are intruded upon when the police remove a suitcase from an individual's possession. The fundamental character of such an action cannot be altered by labeling it a detention -- it is unquestionably a fourth amendment seizure. While the logic of the majority opinion makes sense on the surface, the Supreme Court has repeatedly and emphatically rejected the balancing-type "reasonableness" inquiry the majority chooses here, except for rare instances involving extremely limited intrusions. As the Court noted recently in the arrest context:

> (T)he protections intended by the Framers could all too easily disappear in the consideration and balancing of the multifarious circumstances presented by the different

cases, especially when that balancing may be done in the first instance by police officers engaged in the "often competitive enterprise of ferreting out crime." Johnson v. United States, 333 U.S. 10, 14 (68 S.Ct. 367, 369, 92 L.Ed. 436) (1948). A single, familiar standard is essential to guide police officers who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront. Indeed, our recognition of these dangers and our consequent reluctance to depart from the proved protections afforded by the general rule, are reflected in the narrow limitations emphasized in the cases employing the balancing test. For all but these narrowly defined intrusions, the requisite "balancing" has been performed in centuries of precedent and is embodied in the principle that seizures are "reasonable" only if supported by probable cause.

Dunaway 442 U.S. at 213-14, 99 S.Ct. at 2256-

2257. I find no support for the majority's assertion that the police can seize a suitcase from an individual on mere reasonable suspicion.[7] Indeed, I find the majority's statement that "no

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[7] I also note that neither the Klein nor Viegas courts cite to any Supreme Court authority other than Van Leeuwen for their assertion that a suitcase can be detained on reasonable suspicion. See Viegas, 639 F.2d at 45; Klein, 626 F.2d at 25-26.

This court's recent decision in United States v. Allen, 644 F.2d 749 (9th Cir. 1980), also suggests that such an approach is incorrect. In Allen, the defendant was approached by DEA agents in an airport because he allegedly fit the DEA's "airport drug courier profile." They asked him for identification, and then requested that he accompany them to the airport police station. Upon arrival, they asked if they could search him and he consented. Nothing was found. The agents then asked if they could search Allen's briefcase. When he refused, the officers seized the briefcase. While they were writing a receipt for the case, Allen remained at the police station talking with the officers. "During this conversation, he made damaging admissions concerning the contents of the case." Id. at 751. These admissions were used by Agent Snyder to help support probable cause in his application for a warrant. A search of the briefcase conducted pursuant to that warrant revealed a large quantity of LSD.

We held in that case that the fruits of the search had to be suppressed because "the seizure of the briefcase remain(ed) unjustified by any exception to the requirement of a valid warrant." Id. at 752. As in the

fourth amendment right was invaded" by such an action to be unwarranted.

The majority's departure from established fourth amendment principles may seem eminently reasonable and quite justified by pragmatic consideration of law enforcement. Yet, as Justice Bradley sagely observed in Boyd v. United States, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746 (1886), it is just that sort of temptation that courts must carefully resist.

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present case, the lack of probable cause prevented the use of a "probable cause plus exigent circumstances" type formulation.

Of particular interest was our statement that, because probable cause must be determined at the time of seizure, "Allen's admissions following the seizure of the briefcase cannot be used to justify the seizure." Id. at 752 n.5. Were a brief detention of the briefcase a legitimate act, as the majority holds today, statements made by the defendant during that apparently brief detention would clearly seem to be admissible to establish probable cause. See, e.g., Adams v. Williams, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972) (revolver found on defendant's person pursuant to a Terry-stop gave rise to probable cause to arrest defendant for unlawful possession of a weapon). The majority's holding today thus also appears to be inconsistent with Allen.

"It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure." Id. at 635, 6 S.Ct. at 534.

II. RELATIONSHIP OF THE UNLAWFUL ARREST

I also question the majority's analytical approach in evaluating the seizure of the suitcases as separable from the unlawful arrest. The majority looks to United States v. Chamberlin, 644 F.2d 1262 (9th Cir. 1980) and United States v. Mayes, 524 F.2d 803 (9th Cir. 1975) for support of its argument that the unlawful arrest did not "taint" the seizure and search of the suitcase. These cases do not, however, support this approach.

In Mayes, statements made by a defendant when initially detained led the police to follow his footprints backward, thereby discovering the marijuana cache that supplied

the probable cause for Mayes' arrest. In Chamberlin, statements made during a Terry stop did not need to be suppressed when that stop later became an unlawful arrest.

There is a fundamental difference between those cases and the one at bar. Here, the seizures of the individuals and suitcases were part of a single, unified police action. The majority chooses to slice a lesser included intrusion (seizure of the suitcases) from the simultaneous greater intrusion (unlawful arrest) that began at the inception of contact with the defendants. This is a unique approach to fourth amendment adjudication. The issue here is the scope of the fourth amendment violation itself, not whether the evidence involved was fruit in the sense that it was discovered pursuant to a violation. The question is thus not, as in Chamberlin, whether evidence obtained in the early, legitimate stages of what became an unlawful arrest is admissible, but whether a seizure of luggage that is clearly ancillary to an unlawful

arrest should be subject to a separate analysis.[8] The majority cites no precedent for fragmenting a unified, simultaneous action into isolated parts for analysis. Such an approach would seem to be contrary to the deterrent policy behind the exclusionary rule. See Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). In light of that policy, I cannot approve the judicial technique of winnowing a fortuitous "lawful" facet out of an otherwise unlawful incident. I see no reason for courts artificially to bifurcate police actions on a post hoc basis in an attempt to evade the exclusionary rule.

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[8] By employing such an analysis, this court is going beyond both Klein and Viegas. In Klein, the defendants were initially told they were free to go while their suitcases were being detained. See 626 F.2d at 25. In Viegas, after a brief Terry stop, the defendant consented to a dog sniff, and agreed to accompany a DEA agent to his office. When a dog was not available, the defendant was allowed to leave although the bag was retained. See 639 F.2d at 44. Thus neither court was faced with the type of unified action we have here.

What happened here was a seizure of people and suitcases. I would analyze this integrated action as a single, unlawful seizure and thus would never have reached the Van Leeuwen issue.

I would reverse the district court.

FILED NOVEMBER 6, 1981

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. LINDSAY MARTELL, Defendant-Appellant.	)	No. 80-1163
	)	ORDER
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JOSEPH MINNECI, Defendant-Appellant.	)	No. 80-1154

Before: FARRIS and NELSON, Circuit Judges, and CURTIS,* District Judge.

The Opinion filed in the above matter on August 31, 1981, is amended as follows:

At page 4393 of the Opinion, delete the first sentence of the fourth paragraph and

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* Honorable Jesse W. Curtis, United States District Judge, Central District of California, sitting by designation.

substitute the following language:

> In considering these decisions, we recognize that the Fourth Amendment itself defines the standard for searches and seizures. We do not retreat from the requirement of a warrant or probable cause except in exceptional circumstances. The basic test of reasonableness under the Fourth Amendment is the warrant requirement. The decisions upon which we rely are bottomed upon the concept. . .

FILED JANUARY 13, 1982

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. LINDSAY MARTELL, Defendant-Appellant.	)	No. 80-1163
	)	ORDER
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JOSEPH MINNECI, Defendant-Appellant.	)	No. 80-1154

Before: FARRIS and NELSON, Circuit Judges, and CURTIS*, District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judge Farris has voted to reject the suggestion for rehearing en banc and Judge Curtis would

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* Honorable Jesse W. Curtis, United States District Judge, Central District of California, sitting by designation.

so recommend. Judge Nelson has voted to grant rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

Opposition

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No. 81-1772

In the Supreme Court of the United States

OCTOBER TERM, 1981

LINDSAY MARTELL AND JOSEPH MINNECI, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the temporary detention of petitioners' luggage for exposure to a narcotics detection dog, based on a reasonable suspicion that the luggage contained narcotics, violated the Fourth Amendment.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1772

LINDSAY MARTELL AND JOSEPH MINNECI, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 32-85) is reported at 654 F. 2d 1356.

JURISDICTION

The judgment of the court of appeals was entered on August 31, 1981. A petition for rehearing was denied on January 13, 1982 (Pet. App. 86-87). The petition for a writ of certiorari was filed on March 15, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a bench trial in the United States District Court for the Southern District of California, petitioners were convicted of possessing cocaine with intent to distribute it and of conspiracy to commit that offense, in violation of 21 U.S.C. 841(a)(1) and 846. Petitioner Martell was sentenced to four years' imprisonment, to be followed by a three-year

special parole term. Petitioner Minneci was sentenced to two years' imprisonment, to be followed by a three-year special parole term. The court of appeals affirmed (Pet. App. 32-85).

1. Petitioners were tried on stipulated facts consisting largely of evidence adduced at a suppression hearing. That evidence showed that in September and October 1979 petitioners attempted to transport 568 grams (1¼ pounds) of cocaine from San Diego, California, to Anchorage, Alaska.

On September 30, 1979, DEA Agent Carter in Anchorage telephoned DEA Agent Kenerson in San Diego and told him that two men, one a known drug trafficker, had made arrangements to fly from Anchorage to San Diego. He also advised Agent Kenerson that one of the men—petitioner Martell—had been arrested eight months earlier in possession of a pound of cocaine and $109,000 in cash.[1] Agent Carter also reported that petitioner Martell was travelling under the name of A. Brewer (Pet. App. 33-34).

Surveilling agents at the San Diego airport saw petitioner Minneci arrive that same evening. After making two telephone calls, he took a taxi to the Sheraton Harbor Island Hotel (Pet. App. 34). Petitioner Martell arrived in San Diego at 7:10 the next morning; he too proceeded to the Sheraton and checked in (*ibid.*). At about 9:45 a.m., petitioner Martell left the hotel with an unidentified man. They entered a pickup truck and drove it in a manner that appeared to the agents to be designed to detect possible surveillance. After five minutes, the truck returned to the hotel. Martell entered the hotel and went to the third floor.

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[1]After petitioners were arrested, Agent Kenerson learned that this information was erroneous. It was an associate of petitioner Martell's, not Martell himself, who had been arrested eight months earlier (Pet. App. 33 n.1).

Petitioner Minneci joined him shortly thereafter. At 11:30 that morning, petitioners left the hotel and went directly to the airport. There they purchased tickets for a 12:20 p.m. flight to Anchorage, using the names Minneci and Taylor. At 11:40 a.m., surveilling DEA agents summoned a narcotics detecting dog to the airport (*id.* at 34-35).

After petitioners purchased their tickets, they left their suitcases in a security area and went to the cocktail lounge. At about 12:10 p.m., some 10 minutes before takeoff, petitioner Martell left the lounge. As he neared the boarding area, Agent Kenerson and another DEA agent approached him, identified themselves, and advised petitioner Martell that they were conducting a narcotics investigation. A few minutes later petitioner Minneci was also approached by DEA agents, who identified themselves and advised him of their investigation (Pet. App. 35).

Petitioners declined to consent to a search of their luggage, and they were detained by the agents (Pet. App. 35-36). Twenty minutes after petitioners were first approached, the agents escorted them and their luggage to a nearby Harbor Police Office.[2] A narcotics detecting dog sniffed their luggage and responded in a manner indicating that narcotics were present in the bags (*id.* at 36). The agents then sought and obtained a search warrant for the suitcases. A resulting search revealed two packages containing a total of 568 grams of cocaine in petitioner Martell's suitcase. Petitioners were then arrested (*id.* at 36-37).

2. Prior to trial, petitioners moved to suppress the cocaine found in petitioner Martell's suitcase. The district court denied their motion, finding that the existence of reasonable suspicion justified the detention of petitioners and their luggage (see Pet. 9). On appeal, the court of

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[2]The office was at a distance of about one minute's walk.

appeals held that the 20-minute detention of petitioners' luggage pending the availability of a drug detecting dog was reasonable. The court initially found that the investigatory stop of petitioners was amply justified by the agents' grounds for suspicion (Pet. App. 38). The court found it unnecessary to decide whether the length of the detention of petitioners violated the Fourth Amendment because the discovery of the cocaine was not a fruit of that detention (*id.* at 49 & n.4). Rather, the court held that the evidence was found as a result of a valid temporary detention of the luggage based on reasonable suspicion that the luggage contained contraband, followed by a search pursuant to a warrant (*id.* at 40-44). Judge Nelson dissented, contending that petitioners' detention constituted an illegal arrest and that the detention of their suitcases should not be considered separately from the validity of the detention of their persons (*id.* at 55-83).

DISCUSSION

Petitioners contend (Pet. 13-30) that the court below incorrectly held that an inanimate object may be detained on the basis of reasonable suspicion under circumstances that would not permit a similar detention of a person. The court of appeals' decision, however, fully comports with the requirements of the Fourth Amendment and follows decisions to the same effect in both the Seventh and First Circuits. See *United States* v. *West*, 651 F. 2d 71 (1st Cir. 1981), petition for cert. pending, No. 81-307; *United States* v. *Viegas*, 639 F. 2d 42 (1st Cir.), cert. denied, 451 U.S. 970 (1981); *United States* v. *Klein*, 626 F. 2d 22 (7th Cir. 1980).

Petitioners correctly note that the Second Circuit has held that a temporary detention of luggage in order to permit exposure to a narcotics detecting dog cannot be justified on the basis of reasonable suspicion if a similar

detention of a person would violate the Fourth Amendment. *United States* v. *Place*, 660 F. 2d 44 (2d Cir. 1981).[3] The government has sought certiorari in that case, No. 81-1617, and we recognized in our petition the conflict between the instant decision and *Place* (81-1617 Pet. 13-14).[4] If the Court should grant the government's petition in *Place* and affirm the judgment of the court of appeals, it is possible that the decision below would merit reconsideration in light of this Court's decision in *Place*, although that would depend on the extent to which such a decision should properly be given retroactive effect, a question like that presently sub judice in *United States* v. *Johnson*, No. 80-1608, argued Feb. 24, 1982. If the Court denies certiorari in *Place* or reverses the judgment of the court of appeals, this petition should be denied.

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[3]Petitioners erroneously suggest (Pet. 21-28) that the decision below conflicts with other Ninth Circuit decisions. The court of appeals correctly explained why the decisions relied upon by petitioners have no application here (see Pet. App. 48). The Ninth Circuit's subsequent decision in *United States* v. *O'Connor*, 658 F. 2d 688 (1981), is similarly inapposite. The court there did not consider the propriety of a temporary detention of luggage for the purpose of conducting a brief investigation and, in any event, the court found that probable cause existed. The decision of the court of appeals in this case is fully in accord with other Ninth Circuit decisions. See *United States* v. *Anderson*, 663 F. 2d 935, 938 n.2 (1981).

[4]A copy of our petition in *Place* is being provided to petitioner.

CONCLUSION

The petition for a writ of certiorari should be disposed of as appropriate in light of the Court's disposition of *United States* v. *Place*, No. 81-1617.

Respectfully submitted.

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MAY 1982

DOJ-1982-05